

Sub-Zero Freezer Company, Inc. and Sheet Metal Workers' International Association, AFL-CIO, Local No. 485, Petitioner. Case 28-RC-4102

December 16, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

The Board has considered objections to an election held on June 4, 1982,¹ and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Hearing Officer's findings² and recommendations.³

The Hearing Officer found, and we agree, that none of the allegedly improper conduct was engaged in by an agent of the Petitioner; that none was instigated, authorized, solicited, ratified, condoned, or adopted by the Petitioner; and that the Petitioner, in fact, instructed employees that they should cease such conduct. Thus, as none of the improper conduct was attributable to a party, the issue "is whether the character of the alleged conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Salem No. 1, Inc., d/b/a The Seville*, 262 NLRB 1282 (1982). We find that the conduct in the instant case was not so aggravated that a free expression of choice was denied to any employee.

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 36 for, and 34 against, the Petitioner; there were no challenged ballots.

² The Employer contends that the Hearing Officer was biased and prejudiced against it. This contention is based upon the Hearing Officer's decision not to permit the parties to file briefs, and his ruling that the Employer must provide the Petitioner with affidavits that the Employer had forwarded to the Regional Office in support of its objections. We do not find any merit in this contention. We do not find that the Hearing Officer's rulings demonstrate that he was biased against the Employer. Further, we find that the Employer was fully able to present its position to the Hearing Officer, and that the Hearing Officer's report adequately addressed all aspects of each issue.

³ In Objection 2, the Employer alleged that the Petitioner made several factual misrepresentations at a time that precluded the Employer from replying. The Hearing Officer, applying the standard set forth in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1960), recommended that this objection be overruled. He found, *inter alia*, that the alleged misstatements were not material, nor were they substantial departures from the truth. We overrule this objection on the basis of our decision in *Midland National Life Insurance Company*, 263 NLRB 127 (1982), in which we decided that the Board will no longer probe into the truthfulness or falsity of campaign statements or set elections aside on the basis of alleged misleading campaign statements.

Members Fanning and Jenkins adhere to the *Hollywood Ceramics* standard. However, they agree with the Hearing Officer that the alleged misrepresentations were not material, nor were they substantial, departures from the truth.

In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's recommendations that Objections 4 and 5 be overruled. Contrary to our dissenting colleagues, we agree with the Hearing Officer's finding that the threats to employees and property damage reflected in the record, while not to be condoned, did not result in such an atmosphere of fear and reprisal that a free and fair election could not be conducted.

With respect to the property damage, the record shows that four automobiles were damaged in the Employer's parking lot during the campaign. However, this damage was similar in nature and extent to vandalism which occurred in the Employer's parking lot prior to the advent of Petitioner's campaign. Moreover, the damage which did occur during the campaign was not limited to automobiles owned by opponents of the Petitioner but included acts of vandalism directed at cars owned by a member of the Petitioner's in-plant organizing committee and an employee who had expressed both pro- and antiunion sentiments.⁴ Under these circumstances, and in the absence of *any* evidence to the contrary, we find that this misconduct did not contribute to an atmosphere of fear and reprisal, and, in fact, was not even related to the Petitioner's campaign.

Regarding the alleged threats, we first note that all of the threats of any consequence were made by one employee, Manuel Carrasco. We agree with the Hearing Officer that the seriousness of Carrasco's threats was diluted by the fact that he often "joked around" with the three employees he threatened⁵ and he is, in addition, a "good friend" of one of those three employees and that they go camping together.⁶ Further, Carrasco's presence near the lunchroom during the balloting is hardly worthy of note. Carrasco remained near the lunchroom for only a few minutes, could not see into the lunchroom from where he was standing, and did not speak to any employee entering the lunchroom. Indeed, there is no evidence that any of such employees was even aware of Carrasco's presence.⁷

We also agree with the Hearing Officer that the remaining alleged threats did not rise to the level of creating an atmosphere of fear and reprisal. Campos' "threat" that Brantner would get shot if

⁴ Given these facts, we expressly reject the dissent's bare speculation that such damage "had to" cause "all employees . . . to consider that some very unpleasant consequences might accompany any opposition to the Petitioner."

⁵ *N.L.R.B. v. Bostik Division, U.S.M. Corporation*, 517 F.2d 971 (6th Cir. 1975), *enfg.* 209 NLRB 956 (1974).

⁶ *Urban Telephone Corporation*, 196 NLRB 23 (1972).

⁷ The dissent's comparison of Carrasco's conduct with that which occurred in *Steak House Meat Company, Inc.*, 206 NLRB 28 (1973), is akin to comparing apples and oranges. In *Steak House*, a 16-year-old part-time employee was told by a knife-brandishing meatcutter that if he (the 16-year-old) voted against the Union, the meatcutter would kill him. About a week later, the meatcutter reminded the 16-year-old of the threat by promising to "get back" at him if he voted against the Union. Then several days before the election, another employee, who was present during the second incident above, reinforced the meatcutter's threat by saying that he would "get even" with the 16-year-old if the Union lost the election. As a result of these threats, the 16-year-old did not vote in the election. The Board found that "the character of the conduct was so aggravated" that a free expression of choice was impossible. That type of conduct, which included brandishing a deadly weapon at a 16-year-old part-time employee, is readily distinguishable from the conduct which occurred in the instant case.

she crossed a picket line was greeted with laughter.⁸ Melhorn's comment to Blackmer that Blackmer's car could get "messed up" if she did not join the Union loses significance in light of Blackmer's ignorance of Melhorn's union sympathies. Finally, Fegursky's observation that "things would get hot and heavy around here if people didn't go for the Union," is neither intimidating nor even a threat but is, rather, so ambiguous as to be unworthy of serious consideration.

Finally, although many employees who testified said that they were aware of rumors of threats, all of this testimony described the rumors in only the vaguest, most general terms. We cannot find that this type of plant gossip contributes to the creation of an atmosphere of fear and coercion. Such rumors are rife during any organizational campaign, and we do not think that employees are intimidated by them or even place much credence in them. Moreover, we would be setting aside an inordinate number of elections if we found that this type of rumor could contribute to the creation of an atmosphere of fear and coercion.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Sheet Metal Workers' International Association, AFL-CIO, Local No. 485, and that, pursuant to Section 9(a) of the Act, said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All production, maintenance, shipping, receiving, and warehouse employees employed by the Employer at 3865 West Van Buren Street, Phoenix, Arizona; excluding all office clerical employees, quality control employees, managerial employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

CHAIRMAN VAN DE WATER and MEMBER HUNTER, dissenting:

We would reverse the Hearing Officer and set aside the election on the basis of the Employer's Objection 1.⁹ We would find that threats to em-

ployees and property damage created an atmosphere of fear and coercion that rendered a fair election impossible.¹⁰

Several employees who supported the Petitioner threatened other employees that if they voted against the Petitioner, they would be attacked, or their cars would be damaged. Manuel Carrasco, a well-built, athletic man, threatened two, relatively slight, female employees approximately 1 week before the election. Carrasco asked Shirley Brantner, in the presence of two other employees, if she was going to vote for the Union. When she gave a noncommittal reply, Carrasco told her "if you don't, I'll break your neck." On another occasion, he and Linda Bobb were discussing the threats that had been made during the campaign. Another employee was also present. Carrasco said that threats were "par-for-the-course." He also told her that "if you know what is good for you, you are going to vote for the Union." He then asked her if she had made up her mind yet, and when she replied that she had not, Carrasco asked, "how much do you like your car?" Both of the women testified that although Carrasco sometimes jokes with them, he was definitely not joking when he threatened them.¹¹

On the day of the election, Carrasco stood outside the lunchroom, where the balloting was conducted, and watched employees as they entered the lunchroom. He told employee Linda Overholts that he knew how certain employees intended to vote.

Approximately 2 weeks before the election, employee Katherine Melhorn told Carol Blackmer, an antiunion employee, that if she did not join the Union, her car could get "messed up." After Melhorn made this statement, someone let the air out of the tires on Blackmer's car on three different occasions.

Approximately 3 days before the election, Michael Fegursky, a prounion employee, told another employee that "things would get hot and heavy around here if people didn't go for the Union." Fegursky was regarded by some employees as a "go between" with respect to the Petitioner and the employees, and he answered employees' questions regarding unionization.

At an Employer-sponsored meeting to discuss the Petitioner, Blackmer asked Homer Price, the Employer's president, what would happen if the

⁸ It is important to note that Campos' remark was made at an Employer-sponsored meeting called to discuss the Petitioner, and in the presence of the Employer's president. We find that the remark clearly was non-coercive and jocular.

⁹ We agree that the Employer's Objections 2, 3, 4, and 5 should be overruled. In its Objection 3, the Employer alleged that employee Michael Fegursky offered to waive initiation fees for employees who joined the Union prior to the election. *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). In overruling that objection, we note that Fegursky

was not a member of the in-plant organizing committee, did not solicit authorization cards for the Petitioner, and did not otherwise act as the Petitioner's agent.

¹⁰ See my dissent in *Salem No. 1, Inc. d/b/a The Seville*, 262 NLRB 1282 (1982).

¹¹ Brantner testified that "[Carrasco] wasn't joking when he told me that." Bobb's testimony regarding the threat is quite graphic: "I've never seen that look on [Carrasco's] face before."

Petitioner called a strike and she crossed the picket line. Before Price could respond, George Campos, a prounion employee said that she would get shot.

In addition to the various threats and statements, the cars of several employees were damaged in the Employer's parking lot. The damage included a scratched windshield, a slashed tire, a broken window, and, as noted above, deflated tires.

We would find that these threats and statements, particularly in the context of a significant amount of property damage, instilled such fear and anxiety in the employees that a fair election could not be conducted. Carrasco threatened Brantner and Bobb with very serious bodily injury.¹² In addition, Carrasco's threats were particularly telling because of the relative physical stature of Carrasco as compared to that of the two women. Carrasco's threat to damage Chavez' truck was also serious in light of the fact that cars in the Employer's parking lot were actually being damaged. All of Carrasco's threats were underscored when he waited outside the lunchroom on election day, scrutinizing the voters.

Statements by other employees contributed to the atmosphere of fear and coercion. When the tires on the car of antiunion employee Carol Blackmer were deflated after Melhorn stated that Blackmer's car could get "messed up," Blackmer surely had to consider that prounion employees might be responsible.¹³ Cars belonging to three

other employees were also damaged. In light of the various threats by prounion employees to damage cars, the fact that some cars were indeed vandalized suggests a possible link to prounion employees. Doubtless, all employees, not just those whose cars had been damaged, had to consider that some very unpleasant consequences might accompany any opposition to the Petitioner. In the context of the misconduct evident in this campaign, the remark of prounion employee Michael Fegursky that "things would get hot and heavy around here if people didn't go for the Union" was very ominous.¹⁴ Indeed, it seems as though things were already hot and heavy.

Virtually all of the employees who testified at the hearing said that they were aware that threats had been made to antiunion employees. In our view, this testimony confirms that an atmosphere of fear and coercion pervaded the Employer's plant prior to the election. We note that the election was so close that a change in just one vote would have resulted in a different outcome.

Therefore, because of the seriousness of the threats, the number of employees who were threatened, the proximity of the threats to the election date, the relatively small unit (consisting of approximately 73 eligible voters), the closeness of the vote,¹⁵ the widespread dissemination of the threats, and the property damage, we would direct a new election.

¹² This alone should perhaps be enough to warrant setting aside the election. In *Steak House Meat Company, Inc.*, 206 NLRB 28 (1973), the Board set aside an election when only one employee had been threatened with bodily harm if he did not vote for the Union.

¹³ The fact that Blackmer did not know whether or not Melhorn favored the Petitioner is irrelevant. Whatever her sentiments regarding the Petitioner, Melhorn's statement did contribute to the atmosphere of fear and coercion.

¹⁴ Campos' remark that Blackmer would get shot if she crossed a picket line was similarly ominous.

¹⁵ *N.L.R.B. v. Snokist Growers, Inc.*, 532 F.2d 1239, 1240 (9th Cir. 1976); *N.L.R.B. v. Urban Telephone Corp.*, 499 F.2d 239, 244 (7th Cir. 1974).